

1. The *Sex Discrimination Act* and its Rocky Rite of Passage

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Through an analysis of the parliamentary debates on the Sex Discrimination Bill 1983–84, this chapter underscores the anxiety that preoccupied the opponents of the Bill. Their fear that the Bill would give rise to a totalitarian regime, reminiscent of an Eastern bloc country, is clearly apparent from their own words. Not only would the passage of the Bill signal a blow to democracy, it would result in the creation of a unisex society and, most significantly, the demise of the nuclear family.

Introduction

Will the Prime Minister give an assurance to Australian women that neither the Government's proposed sex discrimination Bill nor ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women will in any way discriminate against women who choose life within the family, will not force them to go out to work, separate them from their children or break up their families, as some people have recently been suggesting?¹

The passage of the *Sex Discrimination Act 1984* (Cth) (*SDA*) represents a high political moment in the history of gender relations in Australia. The seemingly protracted debates of 1983–84² were marked by a deep anxiety about sex roles, the patriarchal family and the wellbeing of children. The hysterical propaganda campaign and the fear engendered by the Bill were out of all proportion to its modest liberal intent that women be 'let in' to certain domains of public and quasi-public life, including employment, on the same terms as men.

Reliance on the external affairs power (*Constitution*, s. 51 [xxix]) to implement legislation in the absence of an express head of power had only recently been

¹ Mrs Elaine Darling, Member for Lilley (ALP), Question without notice, *House Hansard*, 10 May 1983, p. 349.

² Sawer debunks the myth that the debate on the Sex Discrimination Bill was 'the longest in the Australian Parliament'. In fact, it was only the eleventh longest, involving 17 hours of debate, compared with almost 70 hours on the two Communist Party Dissolution Bills. See Marian Sawer with Gail Radford, *Making Women Count: A History of the Women's Electoral Lobby in Australia*, UNSW Press, Sydney, 2008, p. 184.

held to be constitutional by the High Court.³ The relevant international treaty on which the *SDA* was based was the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). For some parliamentarians, recourse to an international treaty as the constitutional basis of domestic law represented not only a derogation of Australian sovereignty, but also a backdoor mechanism for augmenting federal power at the expense of the States,⁴ thereby fanning the residual resentment regarding the attempts by the Whitlam Government to modernise the Australian nation-state.⁵ It is nevertheless apparent that more than constitutionality was at stake. Not only was the shadow of the Cold War discernible in the denunciation of CEDAW as a communist plot, but, by a convenient sleight of hand, the misogyny underpinning opposition to the Bill became imbricated with the bogeys of totalitarianism, including the suggestion that children would be confined to drab childcare centres while their mothers entered forced labour camps. The suspicion of UN member states that did not espouse Western liberal-democratic capitalism also evinced a deep ethnocentrism and fear of the Other.

The question of whether law can change hearts and minds in the face of intransigent opposition remains an enigma. It encouraged us to revisit the debates on the *SDA* in 2009—the year of its silver anniversary—because similar issues are on the agenda once more as we contemplate the *National Human Rights Consultation Report (Brennan Report)*,⁶ the key recommendation of which is that a federal Human Rights Act be enacted. It is already clear that such an Act would be highly contentious, not only because it would depend for its validity on seven international treaties, including CEDAW, but because it would also include a wide-ranging equality prescript—an idea that continues to be viewed as destabilising by conservatives, particularly in the case of sex and sexuality. Indeed, any suggestion of legislating for human rights is being trenchantly opposed by right-wing Christian lobby groups even before a bill has been tabled.⁷ Objections are couched in terms of freedom of conscience and opposition to vesting judges with ‘unfettered discretion’. It is notable that an

³ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (*Koowarta*); *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dams*). *Koowarta* upheld the validity of *Racial Discrimination Act 1975* (Cth), which was based on the Convention on the Elimination of All Forms of Racial Discrimination.

⁴ Queensland Senator Boswell (NP) alleged that the government was using ‘a United Nations treaty to come in right over the top of the States...taking sovereignty away from the States of Australia’ (*Senate Hansard*, 29 November 1983, p. 2963). Senator Walters (LP) claimed that the Hawke Government had ‘altered the Constitution by the backdoor method’ by trying to ‘take over the rights of one of the small States’—namely, her state of Tasmania (*Senate Hansard*, 16 December 1983, p. 3959). See also Senator Crichton-Browne (LP), *Senate Hansard*, 16 December 1983, p. 3960.

⁵ See, for example, *Commonwealth v Queensland* (1975) 134 CLR 298 (Queen of Queensland Case).

⁶ Commonwealth of Australia, *National Human Rights Consultation Report*, Commonwealth of Australia, Canberra, 2009 [*Brennan Report*].

⁷ For example, Patrick Parkinson, Christian concerns with the charter of rights, Paper presented at Cultural and Religious Freedom under a Bill of Rights Conference, Canberra, 2009.

attempt to effect an amendment to the *SDA* in 1983 to include an exception on the ground of freedom of conscience (to discriminate) was rejected in the course of the debates.

Even though there is no established church in Australia and the most recent census figures reveal that 15.5 per cent of the population professes no religion,⁸ Christianity and religious values continue to play a central role in shaping gendered norms. These values, which are based on ancient texts, including the Bible, are often patriarchal and misogynistic, necessarily conflicting with the egalitarian secularism underpinning the legislation. This tension between secularism and religion is now being routinely played out in law.⁹ Accordingly, it is salutary to reflect on the role of law when it crosses the imaginary line between law and morality. If law is confined to a purely functional role, that is unproblematic, but, as soon as its focus shifts to the normative realm, it becomes contentious because unanimity is unattainable in a pluralistic society.

Of course, the *SDA* was not the first occasion on which the federal government had sought to alter social norms in ways that challenged conservative religious beliefs by legislative fiat. The *Family Law Act 1975* (Cth) is a notable example, and there are many others. The *SDA* was, however, widely believed to be revolutionary because of its potential to disrupt the prevailing social order. While many saw this as a social good, a vociferous minority was adamantly opposed.

The Politics of Reform

The 1970s was a distinctive period in Australian political history. The social liberalism associated with Gough Whitlam marked the beginning of a new era. There was a rejection of classical liberalism, moral conservatism and the ‘British to the bootstraps’ ideology of the Menzies years. The Whitlam era involved a dynamic period of law reform that included no-fault divorce, Aboriginal rights, environmental protection, free tertiary education and a range of other distributive justice policies associated with the modernisation of the Australian state. Law was seen as a positive force for change despite its past sins, and feminist activists wanted to play a central role in the transformation.

Social liberalism’s concern with equity and the collective good underscored the starkness of the marked under-representation of women in many facets of public and economic life. A robust civil society enabled feminism in its many guises to emerge and establish itself as a political force for change. The Whitlam

⁸ Australian Bureau of Statistics, *Year Book Australia 2006*, Australian Bureau of Statistics, Canberra, 2007. This figure is taken from the 2001 Census.

⁹ For example, *Members of the Board of the Wesley Mission Council v OV & OW* (No. 2) [2009] NSWADTAP 57.

Government responded positively to the reform agenda. Its initiatives had been supported by the establishment of a formal role for feminist advisors within government bureaucracies, which gave rise to the Australian neologism the 'femocrat'. The functional and the normative came to be intimately intertwined under social liberalism.

The element of bipartisanship associated with the *SDA* puts paid to the suggestion that it was only the Australian Labor Party that favoured reform. It was Liberal Party policy to support the Bill after CEDAW was signed in Copenhagen in 1980 on behalf of Australia by Liberal MP R. J. Ellicott QC, although the convention was not ratified until the Labor Party came into office in 1983. Liberal MPs Ian Macphee and Peter Baume were among the staunchest supporters of the Bill. Sustained opposition emanated from the right wing of the Liberal Party, as well as the National Party. So passionate were the sentiments aroused by the Bill that it is credited with having caused a philosophical split within the Coalition.¹⁰ Maverick independent Senator Brian Harradine relentlessly campaigned against the Bill, zealously pursuing the issue of abortion, to which we will return.

Despite the efforts of feminist reform groups, such as the Women's Electoral Lobby (WEL), to pressure political parties to include issues of concern to women in their election platforms, there was a dearth of women in Parliament before International Women's Year, 1975. A record number of female candidates stood in the Australian federal election of 1983,¹¹ but the number of women elected remained minuscule, which meant that the *SDA* was debated in an overwhelmingly masculinist environment. Of the 125 members in the House of Representatives, there were only six women, all of whom were on the Labor side; in the Senate, there were 13 women and 51 men across all parties. Somewhat ironically in light of the substance of the *SDA*, women were still reliant on the good graces of men to alter entrenched gender norms.

In fact, only a minority of parliamentarians opposed the Bill, but those who did were loud in their denunciation of it. Opposition was galvanised by a deluge of petitions—almost 80 000 opposing the legislation and a mere 1400 in favour. The ultra-conservative lobby groups that orchestrated the campaign against the Bill bombarded parliamentarians with literature, much of it misinformed, as well as lobbying them in person. The most assiduous of these groups was the curiously named Women Who Want to be Women (WWWW), founded and led by Babette Francis of Victoria.¹²

10 Philippa Hawker, 'A plain person's guide to that sex bill', *Sydney Morning Herald*, 6 October 1983, p. 38.

11 Marian Simms, "'A Woman's Place is in the House and in the Senate': Women and the 1983 Elections' in Marian Simms (ed.), *Australian Women and the Political System*, Longman Cheshire, Melbourne, 1984.

12 WWWW had close links with the National Party. Sawyer reports that Francis ran as a National Party candidate in the 1984 federal election against a sitting Liberal who had supported the *SDA*. See Marian Sawyer and Marian Simms, *A Woman's Place: Women and Politics in Australia*, Allen & Unwin, Sydney, 1993, p. 226.

Irene Webley published an insightful piece in 1983 analysing the role of WWWW in the context of the emergence of the New Right in Australia.¹³ Webley suggests that anti-feminist groups, such as WWWW, grew out of resentment over the fact that while government recognised women as a new political constituency, the territory had been commandeered by reformist feminist groups, such as WEL.¹⁴ New Right anti-feminist lobby groups, including WWWW and the Festival of Light, campaigned against the reformist initiatives, claiming to speak for the 'silent majority'—the women who 'chose' to remain at home and were in danger of being seduced by feminist rhetoric. The New Right lobby sought to abolish government consultative groups such as the National Women's Advisory Council,¹⁵ it attacked the validity of women's studies courses in universities and arranged for prominent US Moral Majority campaigners to come to Australia to lend their voices to the anti-progressive campaigns. Webley describes the New Right lobby as a loosely organised coalition with a platform that was essentially 'pro-life, pro-family and pro-Christian'.¹⁶

Legislating for Social Change

Susan Ryan introduced the first Sex Discrimination Bill as a Private Member's Bill in the Senate in 1981 but it was adjourned without a vote. The affirmative action provisions were particularly contentious and did not form part of the revised Bill, which the Labor Party introduced soon after coming into office in 1983. These provisions were set aside and, with the support of Prime Minister, Bob Hawke, became the subject of separate legislation—viz., *Affirmative Action (Equal Employment for Women) Act 1986* (Cth).

Despite the hysteria surrounding the Sex Discrimination Bill, its aims were in fact extremely modest and unlikely to bring about the end of civilisation, as detractors predicted. Indeed, a similar model had been operating in New South Wales, Victoria and South Australia for some years. First of all, the ambit of the legislation was confined to certain areas of public and quasi-public life—viz., employment, education, goods and services, accommodation, land, clubs and the administration of Commonwealth laws and programs. Sexual harassment was expressly proscribed, albeit only in employment. Various exemptions were included, such as those pertaining to educational institutions established by religious bodies—a continuing source of contention on which we will elaborate.

13 Irene Webley, 'The New Right and Women Who Want to be Women in Australian Politics in the 1980s' (1983) 9(1/2) *Hecate* 7.

14 For a history of WEL, see Sawyer, *Making Women Count*.

15 Lyndsay Connors, 'The Politics of the National Women's Advisory Council', in Simms, *Australian Women and the Political System*.

16 Webley, 'The New Right and Women Who Want to be Women in Australian Politics in the 1980s' 15.

What is significant about the ambit of operation in light of the predicted demise of the family is that the private sphere qua family was immunised from scrutiny. No legislature has been brave enough to cross this line.

Second, the legislation was complaint based, not proactive, which meant that the onus was on an aggrieved individual, male or female, to lodge a complaint with the Human Rights Commission (HRC) alleging discrimination.¹⁷ The HRC would endeavour to conciliate the complaint in private. If this was unsuccessful, the HRC had the power to conduct a formal public hearing. At the hearing, the complainant would bear the onus of proving the discrimination according to the civil standard. The HRC did not have the power to make binding orders. Thus, even if the heroic complainant were successful at the HRC hearing, she could find herself confronted with a hearing *de novo* before the Federal Court in pursuit of binding orders. The debates contained no inkling of just how difficult this would prove to be.

The aim of the legislation was to effect equal opportunity for women to enable them to compete for jobs and other social goods on the same terms as men. There is no suggestion of preferential treatment; it was anticipated that the best person for the job would be appointed without regard to sex. The approach comported with the liberal principles of formal equality.¹⁸ While there was no express proposal to alter the workplace profile in order to secure substantive equality, it was nevertheless hoped that the resolution of each complaint would have a ripple effect within the community and contribute to the 'elimination' of discrimination in accordance with CEDAW. As argued elsewhere, however, this hope was naive as it is predicated on a belief that discrimination is finite and ignores the way that it is perennially being reconstituted and revived in an ever-changing socio-political context.¹⁹

Sex discrimination was only inferentially rendered unlawful by the Act (although the proscription of sexual harassment was explicit), as what constitutes discrimination is always contested and must be determined with regard to a particular social and temporal context. Despite limitations in the form of the *SDA*, it possessed great symbolic value. It might not have been able to change attitudes directly, but its proponents hoped that the ripples from each complaint would cause the deeply ingrained prejudice towards women in the public and quasi-public spheres to recede in time. The prospect of a utopian

17 The HRC became the Human Rights and Equal Opportunity Commission in 1986 and the Australian Human Rights Commission in 2009.

18 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, Ch. 1.

19 Margaret Thornton, 'Auditing the *Sex Discrimination Act*' in Marius Smith (ed.), *Human Rights 2004: The Year in Review*, Castan Centre for Human Rights Law, Monash University, Melbourne, 2005, pp. 21–56.

society in which gender would have as much significance as eye colour,²⁰ according to the assimilationist vision, filled the breasts of conservatives with a deep atavistic fear.

The United Nations as Marxist Tyranny: Responses to CEDAW

CEDAW was adopted by the UN General Assembly in 1979²¹ and came into force in 1981. The convention is powerfully worded: state parties 'condemn discrimination against women in all its forms' and agree to take 'all appropriate measures' for its elimination 'by all appropriate means and without delay'.²² A very broad definition of discrimination is included to mean 'any distinction, exclusion or restriction made on the basis of sex',²³ and the convention goes on to enumerate specific areas of private as well as public life on which state parties should focus. The overarching principle is one of effecting equality between men and women in all facets of political, social, economic and cultural life.²⁴ To accelerate the achievement of this end, express reference is made to the acceptability of temporary special measures,²⁵ which include affirmative or positive action. In addition, state parties are required to report regularly to a 23-member committee.

While CEDAW is potentially radical, Australia has interpreted its injunctions narrowly.²⁶ First of all, the focus of the *SDA* is on formal rather than substantive equality. Second, as already mentioned, a strict line of demarcation is maintained between public and private life. Third, the affirmative action provisions disappeared from the Bill at an early stage, which meant that the responsibility for initiating action and proving discrimination rested with individual complainants. Fourth, the Act is sex neutral not sex specific, as is the case with CEDAW—that is, the underlying presupposition of the *SDA* is that men and

20 Richard A. Wasserstrom, 'On Racism and Sexism' in Richard A. Wasserstrom (ed.), *Today's Moral Problems*, Third edition, Macmillan, New York, 1985, pp. 20–1.

21 Resolution 34/180, 18 December 1979.

22 CEDAW, Article 2.

23 CEDAW, Article 1.

24 The shift from a focus on protection and correction in earlier UN instruments to non-discrimination in CEDAW represented a significant change of direction. See Natalie Kaufman Hevener, 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective' (1986) 8 *Human Rights Quarterly* 70.

25 CEDAW, Article 4.

26 Cf. Louise Chappell, 'Winding back Australian Women's Rights: Conventions, Contradictions and Conflicts' (2002) 37(3) *Australian Journal of Political Science* 475–88. For evaluation by former CEDAW Committee Chair Elizabeth Evatt, see Elizabeth Evatt, 'Eliminating Discrimination against Women: The Impact of the UN Convention' (1991–92) 18 *Melbourne University Law Review* 435.

women are already similarly situated, a factor that heightens the burden of proof for complainants. Finally, the Australian Government reserved in two respects: the participation of women in armed combat and paid maternity leave.²⁷

It might also be noted that the constitutionality of the *SDA* did not depend on the external affairs power alone, but on a range of designated powers within the *Constitution*, including trade and commerce (s. 51[i]), banking (s. 51[xiii]), insurance (s. 51[xiv]), corporations (s. 51[xx]) and Territories (s. 122). Susan Ryan recounts how, with the help of Chris Ronalds, every constitutional power that could be used was included in the drafting of the Bill.²⁸ Nevertheless, the entire focus of the attack in the course of the debates in regard to constitutionality is directed towards CEDAW and the use of the external affairs power.²⁹

It is the preponderance of non-Western nation-states among the ratifying states that most disturbed the conservative parliamentarians. At the time of the debates, 55 countries had ratified CEDAW: eight from Africa, six from Asia, 11 from Eastern Europe, 20 from Latin America and 'only' 10 Western countries (including Australia).³⁰ Underscoring the non-Anglo-centric orientation of CEDAW was the composition of the 23-member UN overseeing committee. Elected by secret ballot were four members from the Western Bloc, seven from the Eastern Bloc, six from Latin America, two from Africa and four from Asia.³¹ The chair was from Mongolia.³² The identity of the state parties and the composition of the committee underscored the suggestion that the anxiety of the conservative parliamentarians was not just because Australian sovereignty was being compromised by adherence to a UN treaty, but because of the xenophobia arising from the prominence of non-Western influences.

Such anxiety was expressed with recourse to Cold War rhetoric, which retained continuing resonance for conservatives and served as a trigger to reject the social progressivism represented by the Bill. The suggestion that the United Nations was a pretext for the spread of communism was articulated by Senator Ron

27 The reservation in respect to women in combat duties was partially withdrawn on 30 August 2000 (<<http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>>). The Rudd Government enacted the *Paid Parental Leave Act 2010* (Cth), which established a scheme to begin in January 2011.

28 Susan Ryan, *Catching the Waves: Life in and out of Politics*, HarperCollins, Sydney, 1999, p. 201.

29 Ian Macphee, Member for Balaclava (LP), said: 'No one would deny, for example, that the Bill should rest on the powers that are properly conferred on the Government in respect of interstate trade and commerce, corporations, financial corporations, or banking and insurance, but there is a great deal of disquiet about the use of the external affairs power as a safety net to provide residual validity in case the High Court should find that the more conventional heads of power were inadequate' (*House Hansard*, 5 March 1984, p. 502).

30 Margaret E. Galey, 'International Enforcement of Women's Rights' (1984) 6 *Human Rights Quarterly* 463, 483.

31 *Ibid.*, 476.

32 *Ibid.*

Boswell (LP), who, in a veiled reference to the chair of the CEDAW Committee, announced that '[t]he women of Australia do not want legislation that is drafted by the public servants of Mongolia'.³³

Parochial anxiety about Australia's increased participation on the international stage elicited resentment that 'we should be dragged by the nose to some international convention to be reminded of our derelictions in this country'.³⁴ Peter Drummond (LP) declared that many of the UN member states were 'ruled by Marxist tyrannies. Hypocrisy and humbug are their stock in trade.' He maintained that UN conventions were acceptable only to the extent that they expressed 'innocuous sentiments' and did not 'interfere with the lives of Australians':

The United Nations has some value in providing an international talking-shop, a safety valve, and some useful mechanisms and agencies. However, I think the people of Australia would be horrified to think of it as some kind of incipient world government, whose decrees and conventions are morally superior to the laws of this country.³⁵

Resistance was also expressed as xenophobia, for, according to some senators, CEDAW was not relevant in Anglo-Celtic society, but 'makes perfectly good sense if it relates to the removal of social and legal repression of women as it exists in many Third World countries'.³⁶ Senator Flo Bjelke-Petersen (NP) announced that the Bill would be more appropriate for 'the Middle East'³⁷—an ethnocentric sentiment echoed by future prime minister John Howard, who supported the Bill because 'amongst ethnic groups, there are incidences of discrimination and disadvantage against women which are not present within some of the more conservative or Anglo-Saxon elements of our society'.³⁸ Such attitudes were not limited to the conservative side of politics—for example: Senator Michael Tate (ALP) stated that CEDAW was 'designed to liberate women in quite different cultures from our own who quite often are the slaves and victims of very chauvinistic societies'.³⁹

33 Senator Boswell (LP), *Senate Hansard*, 29 November 1983, p. 2963.

34 Mr Clarrie Millar, Member for Wide Bay (NP), *House Hansard*, 5 March 1984, p. 472.

35 Mr Peter Drummond, Member for Forrest (LP), *House Hansard*, 1 March 1984, p. 344.

36 *Ibid.*

37 Senator Flo Bjelke-Petersen (NP), *Senate Hansard*, 6 December 1983, p. 3335.

38 Hon. Mr John Howard, Member for Bennelong (LP), *House Hansard*, 7 March 1983, p. 671.

39 Senator Michael Tate (ALP), *Senate Hansard*, 21 October 1983, p. 1923.

Feminists in the House

Often characterised by rhetorical flourishes that would be the envy of contemporary political speechwriters, the proposed legislation was condemned by conservatives, who alleged that it was evidence of the newly elected Hawke Labor Government's affiliation with communism. In a surprising display of familiarity with Marxism, Senator Boswell quoted Friedrich Engels as the source of the 'movement towards a unisex society'.⁴⁰ It was claimed the Bill was fundamentally flawed because it undermined traditional values and individual rights, which conservatives claimed were the hallmarks of a liberal democracy. The challenge to these principles was said to emanate chiefly from feminists on the left of the ALP whose recent arrival in the parliamentary chambers had unsettled the chauvinistic culture among conservatives in the Liberal/National Coalition parties. According to Michael Hodgman (LP), the Bill was 'an appalling piece of legislation', which was promoted by 'arrogant minority pressure groups' to be 'inflicted upon the people of Australia by the Hawke socialist Government'. When announcing his intention to vote against the Bill, he said:

Whilst conceding that there are parts of the Bill with which I have no quarrel whatsoever, I have to say that the legislation as a whole is tainted with the pseudo-intellectualism of selfish and unrepresentative feminism and doctrinaire marxist-socialist precepts of contrived equality—defying even the laws of nature. This Bill, in so many ways, brings down upon itself the maxim *reductio ad absurdum*. It therefore does a grave disservice to the principle it espouses.⁴¹

The increased visibility of feminists in parliamentary politics and in senior positions in the public service in Australia from the mid-1970s generated bewilderment and antipathy among conservatives who feared their power would be diminished. Rather than extending equality of opportunity to women, the *SDA* was characterised as representing an attack on fundamental Christian values. The hostile response to progressive social change took the form of reactionary backlash, with denigrating—and often farcical—attacks on progressive women. Feminist politics was dismissed as an incomprehensible fad.

The Member for Franklin, Bruce Goodluck (LP), announced that he had conducted an investigation of WEL and concluded that most of the members

40 Senator Ron Boswell (LP), *Senate Hansard*, 29 November 1983, p. 2963, quoting *The Origin of the Family* (1884).

41 Hon. Mr Michael Hodgman, Member for Denison (LP), *House Hansard*, 5 March 1984, p. 489.

were 'given-up Catholics'. While acknowledging that there were some women in the Liberal Party who supported the Bill, he flippantly dismissed women in the Labor Party because they advocated progressive political positions:

I have looked at the four women on the Government side. They are nice ladies...But they are all the same. They are always campaigning to save the cats, save the dogs and save the whales. They are anti-nuclear and pro-abortion...They are anti the flag and anti the dam...That is predominantly what Labor Party women are like. But they can talk; they are dashed good talkers. We have a few Liberal women who cross those lines and who are called trendy. But the majority of Liberal women are quiet and do not say much...I have nothing against Labor women personally but they all seem to take up this role and I am afraid that everybody is starting to think that that role is the norm.⁴²

Creating a Unisex Society

The suggestion that the *SDA* was an inappropriate mechanism for liberal-democratic capitalist states such as Australia functioned to augment a parallel argument that asserted that it threatened to destabilise traditional sex roles, reflecting a more general anxiety about the impact of second-wave feminism on social norms. Indeed, the *SDA* was credited with significant transformative power; it was said to threaten to effect the eradication of sexual difference altogether. During the course of the parliamentary debates, the conservative think tank the Institute of Public Affairs published the opinion of a prominent paediatrician in which it was claimed that 'the basic philosophy of this Bill is to remove as far as possible all differences between men and women'.⁴³

Senator Pat Giles pointed out that it was beyond the government's power to 'legislate to eradicate gender differences',⁴⁴ but the commitment in CEDAW to the elimination of sexism based on sex-role stereotypes⁴⁵ was characterised by conservative lobby groups and parliamentarians as evidence of a desire to create a 'unisex society'. The use of the term 'unisex'—which had entered the lexicon to mean the provision of services to both men and women—demonstrates a

42 Mr Bruce Goodluck, Member for Franklin (LP), *House Hansard*, 2 March 1984, p. 391. Although Goodluck strongly opposed the *SDA*, he was subsequently reported as saying that he did not want his five daughters to be discriminated against. See Mary-Louise O'Callahan, 'Equality bill sparks a war cry', *Sydney Morning Herald*, 19 February 1986, p. 15.

43 Opinion of Dr Clair Isbister, published by the Institute of Public Affairs and cited by Senator Haines (Democrat), *Senate Hansard*, 21 October 1983, p. 1928.

44 Senator Pat Giles (ALP), *Senate Hansard*, 26 November 1983, p. 405.

45 Article 5(a) commits state parties '[t]o modify the social and cultural patterns of conduct of men and women, with a view to the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

fundamental misunderstanding of the concept of gender neutrality underlying liberal feminist claims to equal opportunity, suggesting a far more powerful role for law in subverting prevailing social norms.

Far from embracing gender neutrality, conservative politicians echoed the thesis of gender complementarity according to which women and men perform different social roles on the basis of their biological uniqueness. This thesis is entrenched within the Western intellectual tradition and can be traced back to Aristotle.⁴⁶ Its crude socio-biology enabled a clear gender division between public and private spheres to be maintained. This was now being threatened, according to conservative politicians.

Ray Groom (LP) argued that '[t]he philosophy from which this Bill springs does not recognise any innate differences between male and female'; 'the sexes are not in competition but, according to the rules of nature, complement each other'.⁴⁷ Such claims were illustrated with reference to overstated examples of women performing non-traditional roles, such as 'digging drains, shearing sheep, slaughtering beasts or occupied as undertakers, [and] sawmill operators'.⁴⁸ Contrary to such images, Senator Archer announced that '[m]en, by nature, are more likely to be leaders, providers and protectors. We can legislate all we like, but we will not change that... Why do women want to be like men, or men want to be like women... What has become wrong with being what nature provides?'⁴⁹

The resistance provoked by the prospect of women working in male-dominated fields highlights the threatening presence of the feminine in the public sphere and its emasculating effect on men. The suggestion that the *SDA* would facilitate the mass entry of women into archetypal 'masculine' areas of work—where resistance to the feminine remains pronounced—was, however, also a rhetorical device intended to undermine the legislation's appeal to the Western liberal principle of equality. It conjures up Cold War images of women in Eastern Bloc countries working in industries absent the trappings of Western notions of femininity. Senator Bjelke-Petersen described the removal of gender stereotypes as 'social engineering'⁵⁰—not only exemplifying the attempt to associate the *SDA* with totalitarianism, but also suggesting the insidious power of law to disrupt conventional norms of gender relations.

46 Londa Schiebinger, *The Mind Has No Sex? Women in the Origins of Modern Science*, Harvard University Press, Cambridge, Mass., 1989, pp. 216–22.

47 Hon. Mr Ray Groom, Member for Braddon (LP), *House Hansard*, 1 March 1984, p. 367.

48 Senator Brian Archer (LP), *Senate Hansard*, 8 November 1983, p. 2299.

49 *Ibid.*

50 Senator Flo Bjelke-Petersen (NP), *Senate Hansard*, 6 December 1983, p. 3335.

Despite the significant feminist theoretical challenges to the nature/culture dualism of sexual difference,⁵¹ biological determinism animated the parliamentary debates. According to Senator Archer, the proposed legislation would make it an offence to take into account the sexual characteristic of 'most ordinary, natural women', who are 'homely and caring...not wildly ambitious...not naturally dominating...and mostly inclined to avoid authority...by nature, more cautious and more considerate'.⁵²

By the early 1980s, women had entered the paid workforce in Australia in significant numbers, but participation was concentrated in the occupational categories of clerical, sales and services, as had been the case for most of the twentieth century.⁵³ In these occupations, it is assumed that 'natural' feminine characteristics such as subservience and compassion are demanded. The feminisation of these traditional roles, particularly when part-time and/or at junior levels, does not unduly disrupt the patriarchal construction of subordination in which full citizenship is withheld from women. As Pateman pointed out: 'The civil right to "work" is still only half-heartedly acknowledged for women. Women in the workplace are still perceived primarily as wives and mothers, not workers.'⁵⁴

Resistance to the *SDA* reflected this perception, as we will go on to discuss.

The Disintegration of the Patriarchal Family

Undoubtedly, the most menacing ramification of the *SDA* was that it was bound to contribute to the disintegration of the patriarchal nuclear family. The Bill was described as an attack on 'the importance of the family as the fundamental unit of society, and our traditional Australian way of life'.⁵⁵ Innumerable petitions were tabled in both houses of parliament alleging that the commitment within CEDAW to the elimination of stereotyped roles for men and women⁵⁶ was likely to contribute to 'further marriage insecurity and breakdown', as well as disrupting

51 For example, Simone de Beauvoir, *The Second Sex*, Translated and edited by H. M. Parshley, Four Square Books, New English Library, London, 1960; Sherry B. Ortner, 'Is Female to Male as Nature is to Culture?' in Michelle Zimbalist Rosaldo and Louise Lamphere (eds), *Woman, Culture and Society*, Stanford University Press, Calif., 1983.

52 Senator Brian Archer (LP), *Senate Hansard*, 8 November 1983, p. 2299.

53 Margaret Power, 'Women's Work is Never Done—by Men: A Socio-economic Model of Sex-typing in Occupations' (1975) 17 *Journal of Industrial Relations* 225.

54 Carole Pateman, *The Disorder of Woman: Democracy, Feminism and Political Theory*, Polity Press, Cambridge, 1989, p. 190.

55 Hon. Mr Michael Hodgman, Member for Denison (LP), *House Hansard*, 5 March 1984, p. 489.

56 Part III, Article 10(c) commits state parties to '[t]he elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods'.

traditional parental roles leading to 'emotional disturbances of childhood'.⁵⁷ In the wake of second-wave feminism and no-fault divorce, reactionary responses crystallised in regard to the increasing instability of the patriarchal nuclear family. By the early 1980s, the introduction of no-fault divorce under the *Family Law Act 1975*, together with increasing numbers of single-parent families headed by women, had a significant impact on the constitution of the family. To counteract the disorder arising from 'unmanned' women usurping the proper role of the pater familias, conservative organisations—notably, WWWW—trenchantly advocated for the primacy of the heterosexual nuclear family.⁵⁸ WWWW was also supported by the wives of prominent conservative politicians, such as Margot Anthony, wife of the National Party leader, who argued that the *SDA* would 'encourage the breakdown of the family unit'.⁵⁹

It was repeatedly alleged that the principle of non-discrimination enshrined in CEDAW imposed a requirement on women to reject their traditional role within the family. Senator Crichton-Browne (LP) claimed that the convention 'seeks to assert that many women who consider themselves to be both happy and equal in their roles as mothers and wives are not happy, and that the steps set out in the Convention requiring a change in their roles are necessary to make them equal'. He declared that '[t]he real intention and purpose of this legislation...is a not too subtle attempt to destroy the structure, the fabric, the values and the intrinsic role of the family unit which for centuries has been the foundation of our orderly and disciplined society and culture'.⁶⁰

Ray Groom (LP) claimed that almost every provision in the convention 'attempts to encourage women to leave home and go into the workforce', but it 'is high time we did more to give proper support to the woman who chooses to remain at home to look after her family'.⁶¹ Despite attempts by supporters of the Bill to make clear that neither CEDAW nor the *SDA* 'obliged anyone to enter the paid work force or to alter people's views of their responsibilities towards their spouses or children',⁶² the legislation was repeatedly said to force mothers out to work, with 'no choice...except for short maternity leave'.⁶³

Women would lose their 'right to choose' to prioritise their role as wives and mothers over paid work. According to Senator Shirley Walters, it was 'quite

57 For example, petition tabled by Senator Sir John Carrick, *Senate Hansard*, 1 November 1983, p. 1976; petition tabled by Senators Button, Sir John Carrick and Collard, *Senate Hansard*, 2 November 1983, p. 2041.

58 WWWW, which has since changed its name to Endeavour Forum, continues to be active in lobbying governments on a range of issues. It claims to have been set up to 'counter feminism, defend the unborn and the traditional family' (<<http://www.endeavourforum.org.au/>>)

59 Jenny Cooke, 'Strong advice for Flo, Mrs Anthony', *Sydney Morning Herald*, 21 September 1983, p. 3.

60 Senator Noel Crichton-Browne (LP), *Senate Hansard*, 9 December 1983, p. 3628.

61 Hon. Mr Ray Groom (LP), Member for Braddon, *House Hansard*, 1 March 1984, p. 367.

62 Senator Peter Durack (LP), *Senate Hansard*, 21 October 1983, p. 1919.

63 Pamphlet distributed by WWWW, cited by Mr Leonard Keogh (ALP), Member for Bowman, *House Hansard*, 2 March 1984, p. 406.

incorrect' that Australian women were 'paid less for equal work and equal time' because 'women choose different careers from men'. She claimed that the reason women earn less than men is because '[w]omen make choices. The facts prove that they choose to have a family...96.1 per cent of married women choose to have babies. Obviously they make it a greater priority than a career.'⁶⁴

The use of the rhetoric of 'choice' resonates with contemporary debates over abortion—another issue that was tenaciously pursued, as we will discuss.

The emotive power of the mother-child relationship was not lost on opponents of the *SDA*, who made dire predictions that motherhood would become a 'second class calling or profession', leaving the state with the responsibility for the 'care and control of the child from infancy to maturity with the opportunity to mould its emotional life and its thinking'.⁶⁵ Rather than a progressive move that would facilitate the entry of women into the paid workforce, child care was described as 'a disgrace', where young children suffered maternal deprivation, 'their thumbs stuck in their mouths, all trying to rock themselves to sleep'.⁶⁶

In the face of such rhetoric, supporters of the legislation recognised the necessity of affirming the legislation's inability to effect significant changes in the structure and organisation of the traditional family. Senator Giles acknowledged that '[s]ome of the less palatable aspects of the family—its nuclear structure and its patriarchal dominance—are already in the process of modification'. Moreover, anti-discrimination legislation would 'lead to a greatly enhanced quality of relationships within that very resilient institution, the family'.⁶⁷ Among members of the Coalition, significant divisions emerged. Senator Teague saw cause to table a statement outlining the Liberal Party's policy on the family as 'the fundamental and most important social and cohesive force in society'.⁶⁸ Nevertheless, the level of antipathy from some members, particularly the Nationals, resulted in the Coalition allowing a conscience vote on the *SDA*.

Conscientious Objection: The Right to Discriminate

The tension between law and morality was revealed most starkly in the proposal that emerged during debates that a conscientious objection clause be included in the *SDA* itself in respect of its areas of operation. Such a clause would provide exemption where there are 'any conscientious beliefs, whether the grounds for

64 Senator Shirley Walters (LP), *Senate Hansard*, 29 November 1983, p. 2950.

65 Document signed by Dr Rendle-Short, Mrs Butler and Mrs Sully, tabled by Senator Baden Teague (LP), *Senate Hansard*, 29 November 1983, p. 2954.

66 Senator Austin Lewis (LP), *Senate Hansard*, 6 December 1983, p. 3329.

67 Senator Pat Giles (ALP), *Senate Hansard*, 8 November 1983, p. 2311.

68 Senator Baden Teague (LP), *Senate Hansard*, 29 November 1983, p. 2954.

the beliefs are or are not of a religious character and whether the beliefs are or are not part of the doctrine of any religion'.⁶⁹ According to Evan Adermann (NP), such an exemption was necessary in a situation in which, for example, he decided to sell property and would otherwise be unable to prevent a prospective buyer who 'intended to institute a brothel, a witches' coven, a temple for Satan worship' if it could be 'alleged anywhere that sex, marital status or the like had any part in my decision'.⁷⁰ Mr Groom announced: 'As I understand the Bill, it requires a person to decide between what his conscience tells him and what the law tells him. I think this is placing a very unfair pressure upon individuals in the community.'⁷¹

The government resisted pressure, however, to include a conscientious objection clause, because, as Senator Ryan pointed out, it would provide that 'one does have the right to discriminate if one's conscience tells one that women are inferior, unable to be trusted, or anything else'.⁷²

Nevertheless, the thin edge of the wedge was apparent, for the government was prepared to concede an exemption for church-run educational institutions to discriminate in employment on the grounds of sex, marital status or pregnancy, 'where the discrimination is in accordance with the doctrines of the religion or creed and the discrimination occurs in good faith...The discrimination itself has to flow from the ethos, the creed, the values, of that particular educational institution'.⁷³ The Opposition did not believe this went far enough—proposing an amendment to exempt non-denominational schools that were 'conducted in accordance with stated moral principles which are not, in fact, dictated by the teachings or beliefs of a particular religion'.⁷⁴ This amendment was defeated in committee.⁷⁵ The exemption in favour of religious schools accords with the general practice of the secular state in deferring to religious freedom. The anomaly in the Australian context is that religious schools are not strictly 'private' as they are the recipients of substantial state funding. No regard was paid to this factor in the debates, although the *Defence of Government Schools (DOGS)* case, in which state aid for private schools had been unsuccessfully challenged in the High Court,⁷⁶ had been a matter of public controversy only a couple of years earlier.

69 Senator Brian Harradine (Ind.), *Senate Hansard*, 16 December 1983, p. 3994.

70 Mr Evan Adermann, Member for Fisher (NP), *House Hansard*, 5 March 1984, p. 485.

71 Hon. Mr Ray Groom, Member for Braddon (LP), *House Hansard*, 1 March 1984, p. 367.

72 Senator Susan Ryan (ALP), *Senate Hansard*, 16 December 1983, p. 3997.

73 Senator Michael Tate (ALP), *Senate Hansard*, 21 October 1983, p. 1923. Under the *Sex Discrimination Act 1984* (s. 38), there is exemption in the area of employment, including contract workers, in situations where this is conducted 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

74 Senator Peter Durack (LP), *Senate Hansard*, 29 November 1983, p. 2948. The Australian Parents' Council (representing private schools) also attacked the government for not going far enough. See Amanda Buckley, 'Parents criticise sex bill changes', *Sydney Morning Herald*, 13 October 1983, p. 5.

75 Amendment proposed by Hon. Mr Ian Macphree, Member for Balaclava (LP), *House Hansard*, 7 March 1984, p. 627.

76 *A-G (Vic) Ex rel Black v Commonwealth* (1981) 146 CLR 559.

Undoubtedly, the biggest 'red herring' of the *SDA* debate was the issue of abortion.⁷⁷ Despite the fact that neither CEDAW nor the Bill made any reference to abortion—which hardly falls within the sex-neutral provision of goods and services—the prospect that the legislation could 'convert a woman's decision to have an abortion into a right to demand that abortion' was addressed in thousands of petitions and repeatedly raised in the parliamentary debates. Senator Ryan clearly explained that anti-discrimination legislation could not be used in this context because '[o]ne cannot say that it is discriminatory to refuse a man an abortion since in the nature of that service it is not available to be offered to a man'.⁷⁸ This was supported by legal advice to the Right to Life Association of Victoria.⁷⁹ Nevertheless, as a result of Senator Harradine's relentless pursuit of the issue,⁸⁰ an amendment was included to clarify concern that the Bill did not apply to the 'provision of services the nature of which is such that they can only be provided to members of one sex'.⁸¹

The passage of the *SDA* represented the triumph of social liberalism in Australia. Far from persuading others through their rhetoric, Senator Harradine and those conservative Liberal and National Party members who opposed the Bill succeeded only in alienating their colleagues with their filibustering and hyperbolic claims. Similarly, groups such as WWWV vigorously garnered opposition to the *SDA* in the broader community, but the final votes suggest that they exercised little impact on the mainstream. In the Senate on 16 December 1983, there were 40 ayes and 12 noes; in the House of Representatives on 7 March 1984, there were 86 ayes and 26 noes.⁸² Susan Ryan noted in her autobiography that the *SDA* was probably the most useful thing she had done in her life.⁸³

Conclusion

The tension between equality and liberty—the constituent elements of liberalism—is very clearly illustrated by the passage of the *SDA* and the subsequent backlash.⁸⁴ Any attempt to implement policies of equality and distributive justice under social liberalism is likely to induce a sense of

77 Senator Susan Ryan (ALP), *Senate Hansard*, 16 December 1983, p. 3964.

78 *Ibid.*, p. 3964; *SDA*, s. 32.

79 Advice provided by P. J. O'Callaghan (30 November 1983), tabled by Senator Michael Tate (ALP), *Senate Hansard*, 16 December 1983, p. 3987.

80 Concern was also expressed by Senator Austin Lewis (LP) (*Senate Hansard*, 6 December 1983, p. 3329) and Senator Flo Bjelke-Petersen (NP) (*Senate Hansard*, 6 December 1983, p. 3335).

81 Senator Kathy Martin (LP), *Senate Hansard*, 16 December 1983, p. 3966.

82 *Senate Hansard*, 16 December 1983, p. 4011; *House Hansard*, 7 March 1984, p. 677.

83 Ryan, *Catching the Waves*, p. 243.

84 As Sawyer shows, the retreat from EEO was not confined to the conservative political parties. See Marian Sawyer, *Sisters in Suits: Women and Public Policy in Australia*, Allen & Unwin, Sydney, 1990, pp. 212–26.

*ressentiment*⁸⁵ among conservatives. As Wendy Brown argues, they feel that their freedom has been attenuated, which causes them to campaign against equality for increased liberty.⁸⁶ When conservatism is in the ascendancy, egalitarianism contracts and the *ressentiment* of the left causes the pendulum to swing in the other direction.

The *ressentiment* of the right over social-liberal initiatives of all kinds, including the *SDA*, led to the fervent embrace of neo-liberalism within little more than a decade of the passage of the *SDA*. The feminist agenda quickly became passé within the wider community as the discourse of the market became the meta-narrative of the millennial moment. An intimate liaison was effected between the state and the market. Although secularism was ostensibly in the ascendancy, the state's embrace of neo-conservatism allowed greater cognisance of and deference to religion.⁸⁷

The category 'woman', which was central to the political power of the women's movement in the period leading up to the passage of the *SDA*, also began to disintegrate. Instead of the one-dimensional woman of feminist discourse, a more nuanced heteroglossic symbol emerged in which greater attention was paid to difference, particularly with regards to race, sexuality and disability. A notable manifestation of the phenomenon was the way women's studies courses began to disappear from the academy in favour of gender studies or diversity studies. With feminism no longer in the ascendancy, the neo-conservative disciplining gaze could be directed to the family in its traditional nuclear incarnation, together with sexuality and extramarital pregnancy.

The *SDA* signified a major rift between secularism and religion in terms of gender norms. The rift highlights the aporia between equality and liberty that is central to liberal theory. On the one hand, as Julian Rivers suggests, gender equality requires the 'complete androgynisation of law',⁸⁸ which has profound moral consequences for understandings of sex and gender. On the other hand, freedom of religion is one of the manifestations of liberty, along with freedom of speech, property and the person, to say nothing of freedom of the market, which is accentuated by conservatism. The struggle over the androgynisation of law, which began with the *SDA*, has become the new site of struggle within liberalism. Rather than a focus on sex per se, attention has, however, subtly shifted to race, religion or age, so that the issues of sex, sexuality and

85 Nietzsche uses this term to capture the desire of a victim to retaliate by inflicting harm on the perpetrator in order that the victim might lessen his or her own pain. See Friedrich Nietzsche, *On the Genealogy of Morals*, Translated by W. Kaufman and R. J. Hollingdale, Vintage Books, New York, 1969, p. 127.

86 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*, Princeton University Press, NJ, 1995, p. 67.

87 Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics*, Allen & Unwin, Sydney, 2005.

88 Julian Rivers, 'Law, religion and gender equality' (2007) 9 *Ecclesiastical Law Journal* 33, 50.

marital status are occluded, other than in instances where corporeality is to the fore: sexual harassment, pregnancy and caring for children. This shift in the prioritisation of grounds instantiates the conservative orthodoxy that sex discrimination is now passé.

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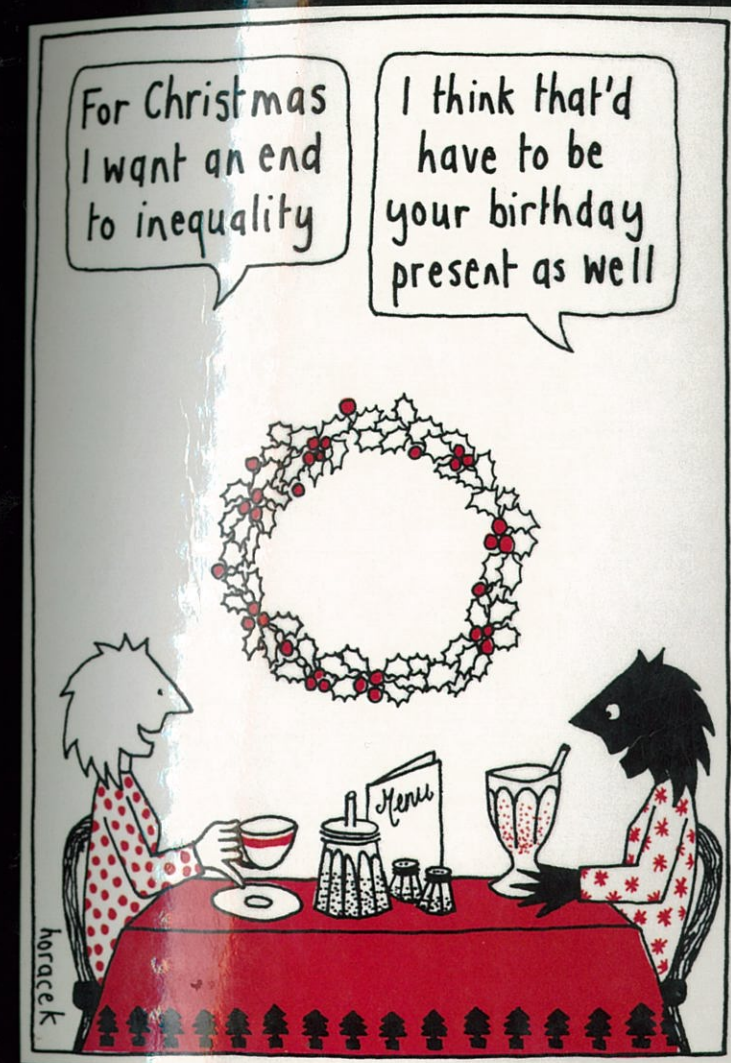
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SEX DISCRIMINATION

in uncertain times



This collection of essays arose from a conference held to mark the silver anniversary of the Australian Sex Discrimination Act (1984). The collection has two aims: first; to honour the contributions of both the spirited individuals who valiantly fought for the enactment of the legislation against the odds, and those who championed the new law once it was passed; secondly, to present a stock-take of the Act within the changed socio-political environment of the 21st century.

The contributors present clear-eyed appraisals of the legislation, in addition to considering new forms of legal regulation, such as Equality Act, and the significance of a Human Rights Act. The introduction of a proactive model, which would impose positive duties on organisations, is explored as an alternative to the existing individual complaint-based model of legislation. The contributors also pay attention to the international human rights framework, particularly the Convention on the Elimination of all Forms of Discrimination against Women and the UN Declaration on the Rights of Indigenous People. The essays are illuminated by recourse to a rich vein of historical and contemporary literature. Regard is also paid to the comparative experience of other jurisdictions, particularly the UK and Canada.

The contributors are all distinguished scholars and practitioners in the fields of discrimination law, human rights and feminism.

Margaret Thornton Margaret Thornton is Professor of Law and Australian Research Council Professorial Fellow at The Australian National University. She has a longstanding interest in discrimination law, having taught and published extensively in the area since the late 1970s. She is a Fellow of the Academy of Social Sciences in Australia and a Foundation Fellow of the Australian Academy of Law.



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Caroline Lambert PhD is the Executive Director of YWCA Australia. She has published on women and human rights, particularly in the context of the Convention on the Elimination of All Forms of Discrimination Against Women. She is interested in the use of international human rights standards in domestic policy advocacy for women's equality.

Trish Luker

Trish Luker is an early career researcher working at the intersection of law, social sciences and the humanities. After completing her PhD at La Trobe University, she worked as a research associate for Margaret Thornton on the EEO in a Culture of Uncertainty project at The Australian National University.

In 2010, she took up a postdoctoral research fellowship at the University of Queensland. Her work draws on critical theory to investigate the reception of evidence in human rights claims.

Susan Magarey

Susan Magarey AM, FASSA, PhD is the founder of the Magarey Medal for Biography and Adjunct-Professor in History at Adelaide University. Her prize-winning biography of Catherine Helen Spence, *Unbridling the Tongues of Women*, is to be republished in 2010; her biography of Dame Roma Mitchell, *Roma the First*, which she wrote with Kerrie Round, is in its second imprint.

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Archana Parashar is Associate Professor in Law at Macquarie University, Sydney. Her research interests focus on the potential of law to achieve social justice. She has written in the areas of critical legal theory, feminist legal theory, family laws and anti-discrimination laws. In her research, she relies on interdisciplinary approaches to critique legal theory. Her latest book is a co-edited volume, *Decolonisation of Legal Knowledge* (Routledge, 2009).

Simon Rice

Simon Rice is an Associate Professor and Director of Law Reform and Social Justice at the College of Law, The Australian National University, Canberra. He is a part-time judicial member of the NSW Administrative Decision Tribunal in the Equal Opportunity Division, and Chair of the ACT Law Reform Advisory Council. With Neil Rees and Kate Lindsay, he wrote *Australian Anti-Discrimination Law* (Federation Press, 2008).

Chris Ronalds

Chris Ronalds AM, SC is a Sydney barrister specialising in discrimination and employment law. She was closely involved with the development of the Sex Discrimination Bill and its subsequent passage through the Commonwealth Parliament. She has run various sex discrimination test cases exploring a myriad issues, including returning to work after maternity leave and working part-time.

Susan Ryan

Hon. Susan Ryan AO was responsible for the landmark *Sex Discrimination Act 1984* and the *Affirmative Action Act 1986*. From 1975 to 1988, she was Senator for the Australian Capital Territory and the first woman to hold a cabinet post in a federal Labor Government, serving as Minister for Education 1983–87 and Minister Assisting the Prime Minister on the Status of Women 1983–88. She is a Pro-Chancellor and council member of the University of New South Wales, chair of a major superannuation plan and chair of the Australian Human Rights Group, an organisation committed to a human rights act.

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Marian Sawer AO is an Emeritus Professor in the School of Political Science and International Relations, The Australian National University, and Vice-President of the International Political Science Association. Her most recent book is the co-edited *Federalism, Feminism and Multilevel Governance* (2010). She has had a long association with the *Sex Discrimination Act*, since before it was born.

Belinda Smith

Dr Belinda Smith holds a Senior Lectureship in the Faculty of Law, University of Sydney. Her main field of research is anti-discrimination laws, with a focus on gender equity and workers with family responsibilities. In articles and chapters published in Australia, the United States and Japan, she has explored alternative regulatory tools and frameworks for promoting equality.

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Margaret Thornton is Professor of Law and Australian Research Council Professorial Fellow at The Australian National University. She has a longstanding interest in discrimination law, having taught and published extensively in the area since the late 1970s. She is a Fellow of the Academy of Social Sciences in Australia and a Foundation Fellow of the Australian Academy of Law.

Sharon H. Venne

Sharon H. Venne worked at the United Nations before the establishment of the Working Group on Indigenous Peoples in 1982. The background research to the many clauses in the Declaration on the Rights of Indigenous Peoples is included in her book *Our Elders Understand Our Rights: Evolving International Law regarding Indigenous Peoples*, (Theytus Books, Penticton, BC, 1999).

Helen Watchirs

Dr Helen Watchirs OAM was appointed the ACT Human Rights and Discrimination Commissioner in 2004. She is a member of the Federal Ministerial Advisory Council on Blood Borne Viruses and STIs. Dr Watchirs has worked for 28 years as a human rights lawyer and/or consultant including with the Federal Government and UN agencies, such as UNAIDS, the World Health Organisation (WHO), the International Labour Organisation (ILO), United Nations Development Programme (UNDP) and the Office of the High Commissioner for Human Rights. Her PhD in human rights and master's in public law from The Australian National University focus on HIV/AIDS issues.

Irene Watson

Irene Watson is an Associate Professor at the University of South Australia and is the author of a number of articles and books on Aboriginal peoples and the law. She is currently completing a manuscript, 'Raw Law', for publication.

Preface

A Silver Anniversary

Anti-discrimination legislation in Australia has had a chequered history since its inception 40 years ago. Discrimination on the ground of sex, race, sexuality, disability, age or other characteristic of identity was not recognised by the common law. Its proscription was entirely a statutory creation and the legislation has been beset with uncertainty and timorousness, which have contributed to its volatility. This is clearly apparent in regard to sex discrimination, as differential treatment between the sexes was historically and philosophically viewed as 'natural'. The anxiety underpinning the legal proscription of discrimination is in evidence in the parliamentary debates on the *Sex Discrimination Act 1984* (Cth) (*SDA*). While some of the views of the opponents can appear quaint in the twenty-first century—albeit only 25 years after they were articulated—the commitment by the state to anything other than formal equality continues to be contentious.

Indeed, the years since the enactment of the *SDA* have been marked by struggles for substantive equality (equality of outcome) for women and for members of minority groups still consigned to otherness within the polity. Such struggles have sometimes succeeded in eliciting official responses, usually in the form of inquiries and reports rather than legislative change, and the small gains attained have all too often resulted in a backlash.

Recent government activity includes a review of the *SDA* in 2008,¹ the *National Human Rights Consultation Report* in 2009² and the workplace reforms incorporated in the *Fair Work Act 2009* (Cth). The review of the *SDA* raised the possibility of an Equality Act—an avenue that has been followed in the United Kingdom³—which poses complex questions regarding the interaction between the *SDA* and other federal anti-discrimination legislation, as well as State and Territory legislation. In 2010, the federal government announced that the Commonwealth anti-discrimination laws, including the *SDA*,⁴ would be

1 Australian Senate Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Commonwealth of Australia, Canberra, 2008.

2 Commonwealth of Australia, *National Human Rights Consultation Report*, Attorney-General's Department, Canberra, 2009 [*Brennan Report*].

3 *Equality Act 2010* (UK).

4 The other Acts are the *Racial Discrimination Act 1975* (Cth) (*RDA*), the *Disability Discrimination Act 1992* (Cth) (*DDA*) and the *Age Discrimination Act 2004* (Cth) (*ADA*).

incorporated into 'one single comprehensive law'.⁵ The prospect of a federal Human Rights Act was also temporarily on the agenda, although the Attorney-General announced in 2010 that the idea of a national charter of human rights had been shelved.⁶

This collection of essays traces the life of the *SDA*, paying particular attention to the socio-political context in which the *SDA* was conceived and debated. While South Australia, Victoria and New South Wales all proscribed sex discrimination earlier than the Commonwealth through the enactment of omnibus anti-discrimination Acts in the 1970s, with other States and Territories following in the 1990s, the special status attaching to national legislation within a federal compact inevitably becomes the primary focus of attention. Nevertheless, many of the observations made about the *SDA* apply also to State and Territory legislation. While there is an absence of harmonisation between jurisdictions, the same compensatory model is utilised, together with a similar ambit of operation and procedure. The individual complaint-based model of anti-discrimination is now showing signs of stress.⁷ This is due partly to age but, more specifically, to contextual factors, including changes in the political climate, which have induced a move away from workers' rights to employer prerogative. Anti-discrimination legislation is extraordinarily sensitive to the political pulse of the time, a proposition I illustrate by reference to the area of employment from where the overwhelming preponderance of complaints under the *SDA*—91 per cent in 2008–09—emanate.⁸

The Market as the Measure of all Things

Neo-liberalism, which has become the dominant political philosophy of our time, has exerted a profound effect on the culture and practice of anti-discrimination law. Social liberalism, in which the legislation had its genesis and which reached its high point in Australia in the 1970s, evinced a concern for collective good, distributive justice and other egalitarian values associated with the welfare state. While this incarnation of liberalism was not opposed to the operation of the free market, its excesses were tempered by state regulation in the interests of the greater good.

⁵ Attorney-General Hon. Robert McClelland MP and Minister for Finance and Deregulation Hon. Lindsay Tanner MP, Reform of anti-discrimination legislation, Media release, 21 April 2010, Parliament House, Canberra. The Government Response to the Senate Report was tabled on 4 May 2010: < <http://www.ag.gov.au> >

⁶ Chris Merrit, 'A-G pulls plug on charter of rights', *The Australian*, 21 April 2010, p. 7.

⁷ It is notable that updated legislation was enacted in Victoria in 2010. See *Equal Opportunity Act 2010* (Vic.).

⁸ Australian Human Rights Commission, *Annual Report 2008–09*, s4.4.5, Australian Human Rights Commission, Sydney, 2009, <http://www.humanrights.gov.au/about/publications/annual_reports/2008_2009/chap4.html#s4_4>

The state is therefore central to the realisation of equality for women despite its fickleness, which is clearly evident when the political pendulum swings rightwards. The neo-liberal state is not in fact concerned with equality at all, but with its liberal twin—freedom—particularly the 'free' market and the freedom to maximise wealth. The inevitable result of untrammelled freedom and competition within the market is *inequality*, not equality.

Despite all the talk of deregulation and the privatisation of public goods associated with neo-liberalism, the state has not resiled altogether from its regulatory role but has transformed and adapted it. Instead of sustaining and promoting the common good associated with civil society, it has formed an intimate association with the market. Productivity and the maximisation of wealth, not just nationally, but globally, have become the primary aims of the neo-liberal state. Government has therefore been busy removing obstacles to facilitate the untrammelled operation of the market—such as centralised wage fixing and worker protections. Work intensification, casualisation and flexibility became the new norms during the period of the Howard Government in the 1990s. In contradistinction, egalitarianism, social justice and equity—the hallmarks of social liberalism—were treated as dispensable.

While neo-liberalism is thought of primarily in terms of the economy and the market, it has also exercised a profound effect on the social fabric of our society, to the extent that it has entered the very soul of the citizen.⁹ Neo-liberal subjects are expected to promote themselves and take responsibility for their own lives. If they do not succeed, it is deemed to be their fault. This individualised focus deflects attention away from the collective harms of sexism, as well as racism, homophobia, ageism and ableism. As rational choice is the leitmotif of neo-liberalism and the social has been whittled away, there is an ever-contracting space within public discourses to accommodate critiques of discrimination. The history of inequality and the abuse of power are not only discomfiting within a neo-liberal milieu; critique has no use value in the market. The assumption is that it should be sloughed off in favour of applied knowledge. Indeed, feminism—with its critical eye always directed to the way things might be—was conveniently described by former Prime Minister John Howard as *passé*.¹⁰ The social-liberal concern with anti-discrimination and equal employment opportunity (EEO) has also been depicted as cumbrous and old-fashioned. As a result, discourses involving the 'woman question' became de-gendered, desexualised and depoliticised.

⁹ Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics*, Princeton University Press, NJ, 2005, p. 39.

¹⁰ Anne Summers, *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia*, Random House, Sydney, 2003, p. 21.

While the Rudd Labor Government replaced the Howard Coalition Government at the end of 2007 and promised an end to the hardline policies of the Howard years, the political pendulum did not swing back to the social-liberal position, although a softening of some of neo-liberalism's more egregious manifestations could be detected. Even the global financial crisis of 2008–09 did not seriously challenge the love affair of the Australian state with the values of neo-liberalism. One must therefore ask what space is there within a neo-liberal climate for a critical sex discrimination discourse committed to equality and egalitarianism?

As testament to neo-liberalism's cynicism for anti-discrimination legislation, it is notable that a decline in the lodgment of complaints occurred during the Howard years. While the percentage of formal hearings was always low, the figure dropped to approximately 1 per cent of complaints, with a minuscule number of appeals having little chance of success for complainants, as Beth Gaze shows in her chapter. The High Court picture regarding sex discrimination is also dispiriting. After the initial trailblazing successes of *Wardley v Ansett*¹¹ and *Australian Iron & Steel*,¹² every anti-discrimination decision since *Wik*¹³ has favoured the corporate respondent, supported by a narrow legalism.¹⁴ *Amery*,¹⁵ a representative complaint based on indirect sex discrimination, is a case in point. The shift away from the beneficent aims of anti-discrimination legislation has affected all grounds.¹⁶

The interpretative role of the courts during these years is a salutary reminder of the fact that all three branches of government—the legislature, the executive and the judiciary—are important sites for the constitution and reconstitution of sex discrimination. Hence, as I argued on the twentieth anniversary of the *SDA*,¹⁷ we are not dealing with a finite variable that can be *eliminated* over time, as suggested by the wording of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Sex discrimination is a slippery concept, tolerance for which depends on the socio-political mood of the moment. As long as 'the good of the economy' is permitted to trump the idea of gender justice, change will not occur. These essays seek to challenge what has become the prevailing orthodoxy.

11 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

12 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

13 *Wik Peoples & Thayorre People v Queensland* (1996) 141 ALR 129.

14 Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31.

15 *New South Wales v Amery* (2006) 226 ALR 196.

16 For example: *IW v City of Perth* (1997) 191 CLR 1; *Qantas Airways Limited v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

17 Margaret Thornton, 'Auditing the Sex Discrimination Act' in Marius Smith (ed.), *Human Rights 2004: The Year in Review*, Castan Centre for Human Rights Law, Monash University, Melbourne, 2005.

The Collection

Part One: A Silver Anniversary

The addresses by Watchirs, Ryan and Ronalds at the launch of the conference throw light on the genesis of the *SDA* and subsequent chapters. They also give voice to all those (mainly women) who played a prominent role in the struggle for gender equality, ensuring that their voices are not entombed in silence.

Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, pays tribute to the contribution of a line of federal sex discrimination commissioners over 25 years, as well as presenting an overview of the state of play in regard to sex discrimination. In addition to summarising the main points of the Senate Report on the *SDA*, she draws attention to the roller-coaster ride of gender equality, for just as one issue is addressed, another problem emerges on the scene.

The Hon. Susan Ryan was the major political force behind the *SDA*. As a senator in 1981, she introduced the first Private Member's Bill, which lapsed. When Labor came into power in 1983, she was able to introduce a revised bill. While the *SDA* has often been criticised for being weak and wimpish, Susan Ryan's comment succinctly exemplifies the adage that 'politics is the art of the possible'. Her view—a salutary one in difficult times—is that law reform should not be deferred indefinitely until the ideal legislative instrument has been attained.

Chris Ronalds SC, who drafted the Sex Discrimination Bill, echoes Ryan's view that a pragmatic incremental approach to legislation is the appropriate way to proceed. Ronalds also acknowledges the contribution of another distinct group of women pioneers within the annals of the *SDA*—namely, those who gave their names to the landmark test cases that validated the passage of the Act.

Margaret Thornton and Trish Luker's chapter focuses on the rhetoric of the parliamentary debates of 1983–84, which highlights the deep anxiety concerning sex roles and the patriarchal family that surrounded the passage of the *SDA*. They suggest that the progressive legislative initiative induced a backlash or sense of *ressentiment* (to use Nietzsche's term) on the part of conservatives, which manifested itself in the neo-liberal swing in favour of conservatism that occurred soon afterwards.

Part Two: Then and Now

Ann Genovese presents a prehistory of the *SDA* through an examination of the genesis of gendered law reform. She argues that early 1970s feminism, in the

main, was not intellectually or politically centred on questions of the law and legislative reform but on praxis. She shows how feminist engagement with the state evolved from practical movements and New Left politics, such as Women Behind Bars. The chapter raises questions about the way contemporary feminist legal thinking could have become overly concerned with the lego-centric at the expense of the grassroots.

Marian Sawyer shows that women's struggle for equality did not end with the passage of the *SDA*. Rather, the Act presaged a continuing struggle to retain the status quo, despite the appearance of progress. Sawyer shows how political shifts, including budget cuts and changes in industrial relations, have effected new manifestations of inequality, which are salutary reminders of the fact that any semblance of equality for women is tentative and contingent. Her text is illuminated by graphic images.

Susan Magarey similarly stands back to take a bird's-eye view of the trajectory of the *SDA*. In highlighting the significance of context, she alludes to the feminist discourses of the 1980s—women's liberation, the women's peace movement, women's studies and Indigeneity—to highlight the way the notion of the collective good has been eviscerated and replaced by individualism. The economic and environmental disasters of today are salutary reminders of the continuing relevance of the women's movement, not just as a question of justice for women, but for society as a whole.

Part Three: Critiquing the *SDA*

Beth Gaze overviews the experience of sex discrimination in the courts, where judges have tended to undervalue discriminatory harms. Drawing on the insights of social psychology, she argues that litigation is a limited mechanism for dealing with pervasive discrimination. She recommends that we move beyond the remedial model to pay attention to proactive measures, although she acknowledges that monitoring such schemes could prove difficult and expensive.

Sara Charlesworth identifies three distinct regulatory frameworks for dealing with sex discrimination at the federal level—the *SDA*, affirmative action and industrial relations—drawing attention to their weaknesses and limitations. She recommends, as an alternative to these modes, the decent work agenda proposed by the International Labour Organisation (ILO) as the basis of an integrated legislative framework. While gender equality necessarily lies at the heart of decent work for women, it has not received the attention it deserves. She argues that it be brought into the mainstream work agenda rather than being allowed to languish at the margins.

Caroline Lambert shows how the figures of the 'ideal worker' and the 'domestic care giver' are inscribed and reinscribed in gendered ways on the bodies of workers by virtue of the limitations of the *SDA* in addressing caring work. She focuses on the notion of the comparator, indirect discrimination and the concept of reasonableness to highlight the way a formalistic rather than a substantive approach to equality is perennially favoured, despite CEDAW's recognition of the importance of reproductive labour.

Part Four: Equivocations of Equality

Reg Graycar and Jenny Morgan examine a recent suggestion by the Senate Standing Committee on Legal and Constitutional Affairs that it might be timely to consider an Equality Act. They consider a number of questions: whether this proposal has any potential to enhance women's equality in Australia; whether it more readily addresses problems of intersectionality—the fact that women have a race, a sexuality or a multiplicity of identities that operate differently at different times and in different contexts; and whether such an approach would encourage a move beyond the complaint-based focus of traditional discrimination laws. They conclude by raising questions about the processes, the fora and the identity of the personnel engaged in the debate of these issues.

Simon Rice also considers the idea of an Equality Act, which was first raised by the Australian Law Reform Commission in its report that coincided with the tenth anniversary of the *SDA* and, again, in the Senate Committee Report on the *SDA* in 2008. Rice examines the law reform process underpinning the *Equality Act 2010 (UK)* to consider what lessons Australia might learn from it. While there is much to be said for the positive duty in the UK Act, Rice emphasises that the enactment of an Equality Act ultimately depends on political will.

Belinda Smith turns to the Canadian equality jurisprudence to consider why the judicial approaches appear to be more robust than those favoured by Australian courts. Through a comparative analysis, she argues that the prescriptive wording of the Australian statutes has induced a technical and formalistic approach towards equality and discrimination. Leaving aside the fact that there is a constitutional guarantee of equality in Canada, Smith suggests that Australian reformist bodies could learn much from the Canadian approach.

Archana Parashar also focuses on the judicial role but her approach contrasts with that of Smith. Parashar is most concerned with the interpretative dilemmas that beset equality jurisprudence. She takes her cue from the post-structural insight that knowledge is always historically contingent. She argues that the attribution of meaning is not dependent on the words of the text alone but is informed by context, judicial subjectivity and responsibility, which involve choice. Parashar concludes by arguing that the interpretative role of judges should be linked to the critical and ethical education of law students.

Part Five: Women's Rights as Human Rights

The springboard for Susan Harris Rimmer's chapter is a speech made by Elizabeth Evatt on the twentieth anniversary of the *SDA*. Evatt argued that Australian law falls short of its obligations under CEDAW and other international instruments to provide equality rights and non-discrimination in regard to women. Harris Rimmer reviews progress in Australia in the past five years according to Evatt's criteria. She also celebrates the role of key figures—Evatt, Jane Connors, Andrew Byrnes and Helen L'Orange—who contributed to the creation of multilevel strategies to raise up Australian women and realise their rights.

Margaret Thornton considers whether a domestic human rights charter might assist in the realisation of substantive gender equality despite the fact that the discourse of human rights poses both a political and an epistemological dilemma for women. Although there has been a rhetorical shift from discrimination to human rights, it is apparent that there is still timidity about human rights at the domestic level. This does not bode well for the prospects of a charter addressing intersectionality challenges, such as sex plus race or sex plus sexuality. Thornton considers the Australian initiatives of the twenty-first century and illustrates her concerns with some examples from the United Kingdom.

Irene Watson and Sharon Venne acknowledge that all people are accorded the same right not to be discriminated against on the grounds of sex, but argue that this right is experienced differently by different people, and that the difference could be measured and scaled according to how close one's life is located to the centre of white privilege. They argue that the experience of discrimination by Aboriginal people means that the primary focus must be directed to the issue of race. Watson and Venne present a critique of the recent UN Declaration on the Rights of Indigenous Peoples as the key international human rights instrument. Their prognosis as to how valuable it might be is, however, not propitious in light of a return to assimilationist policies in Australia.

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Part I

A Silver Anniversary